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IN THE

Supreme Court of the United States

KALAMA SERVICES, INC. and ACE U.S.A. INC.,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, and MICHAEL ILASZCAT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case concerning the imposition of Defense Base Act liability on private government contractors for actions prohibited by the United States military command and unrelated to the contractor's employment functions the Ninth Circuit circumvented this Court's judicially created "zone of special danger" doctrine to impose absolute liability.

The number of American civilians and private contractors subject to the Act is increasing exponentially as the privatization of U.S. military functions expands in response to terrorism and nation building obligations. As such private contractor involvement in all areas of our national defense, including deployment with front line troops and construction of public works projects in areas of active combat, continues, the U.S. military's supervision over the private workforce and imposition of the military's standard of conduct has become a regular aspect of the contractual relationship determining the rights and responsibilities of the contractors and their employees. The Ninth Circuit's circumvention of the "zone of special danger" doctrine rejects these considerations.

The questions presented, therefore, are:

1. Does this Court's judicially created "zone of special danger" doctrine, which identifies the parameters of circumstantial events and employee actions imposing Defense Base Act liability on private government contractors employed overseas on national security, defense and public work projects, allow for the imposition of absolute liability when the employee is injured while off duty, in a social

club, and engaged in personal frolicsome behavior of no benefit to the employer in a setting presenting no dangers of a unique nature?

2. Does the "zone of special danger" doctrine allow for the imposition of Defense Base Act liability in circumstances wherein the employee was injured while knowingly and voluntarily participating in conduct which was expressly prohibited by the U.S. military base commander and which resulted in a military order permanently barring the employee from the locale and from further private government contract work.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner Kalama Services, Inc. is a joint venture of parent company HNSI Serco BRSC. No publicly held company owns 10% or more of the petitioner's stock.

Petitioner ACE U.S.A., Inc. is the successor in interest to Cigna Property and Casualty Insurance Company's worker's compensation and employer's liability insurance business. There is no parent corporation nor publicly held company which owns 10% or more of the petitioner's stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-14a) is published at 354 F.3d 1085 (9th Cir. 2004). The Decision and Order of the Benefits Review Board dated June 19, 2002 (15a -30a) is published at 36 BRBS 78 (2002). The Decision and Order Awarding Benefits dated June 13, 2001 (31a-53a) is published at 35 BRBS 627 (ALJ) (2001).

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on January 15, 2004. (App. 1a). This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 33 United States Code, Section 902(2).

DEFINITIONS

When used in this Act—

. . .

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

The pertinent statutes involved are the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901, *et seq.* ("LHWCA") and the Defense Base Act, 42 U.S.C. §§ 1651, *et seq.* ("DBA").

STATEMENT OF THE CASE

This case presents to this Court the opportunity to delineate the limits of the "zone of special danger" doctrine, which Justice Frankfurter first elucidated as the controlling boundaries of applicability of the Defense Base Act ("DBA"), to situational events involving private contractors employed by the United States overseas to accomplish its public, military and national defense interests. The doctrine asserts that in determining whether a particular injury is "arising out of and in the course of employment", as statutorily mandated, "all that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose." *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504,507 (1951). The doctrine did not read the "job-connected" requirement of coverage out of the statute to be replaced by a "but for" relationship, see Justice Harlan's dissent in *O'Keefe v. Smith Associates,* 380 U.S. 359, 369 (1965), and was intended by Justice Frankfurter to exclude from the coverage of the DBA "the kind of conduct that employees engage in as frolics of their own". *O'Leary,* at 507.

In this case the Ninth Circuit has circumvented the doctrine so as to impose absolute liability under the DBA upon the employer for any and all types of injuries, no matter how caused, as long as they occur at distant, isolated locations, even if as a consequence of an employee's

frolicsome actions specifically prohibited by the U.S. military commander and sufficiently serious in nature as to result in the employee's compulsory debarment from the location.

STATEMENT OF FACTS

Michael Ilaszczat (the "employee") was employed by Kalama on the Johnston Atoll as the manager of its self-help store from August, 1996 until August 5, 1999. His employment was pursuant to and in furtherance of Kalama's contract with the United States Navy, in support of the DET 1-15th Air Base Wing, which obligated Kalama to provide a plethora of support services on the Johnston Atoll including operation and maintenance of the power and water desalination plants, building maintenance, landscaping, refuse collection, housing and food services, laundry and operation of the recreational facilities. (ACE is the DBA insurance carrier for Kalama). The Johnston Atoll is a two mile wide by one-half mile long island in the central Pacific approximately 700 miles south-west of Hawaii, which was used for over four decades until late 2000 by the United States military as a base to test, store and dispose of extremely dangerous and toxic weaponry including nuclear and chemical materials.

Given the unique and dangerous military operations taking place on the Atoll the military base commander maintained complete and final authority as the arbiter of the standards of conduct imposed on military and civilian personnel. Under threat of automatic debarment and permanent expulsion from the Atoll, and with it the employee's working under the Kalama/U.S.Navy contract, gambling and involvement in physical altercations were strictly prohibited.

In December of 1996, while in the course of performing his work duties, the employee injured his left leg. As a compensable claim under the DBA Kalama provided all statutory compensation and medical benefits, including the providing of a total left knee replacement in December, 1998. Thereafter, on July 25,1999, the employee injured his left hip while on the Johnston Atoll although not in the course of performing his work duties but, rather, while engaged in the prohibited activities of gambling and involvement in physical altercation at an after hours social club. It is the circumstances of this event which present to the court the issue of whether the employee suffered an injury "arising out of and in the course of employment" so as to impose liability under the DBA on Kalama.

Prior to trial before the Administrative Law Judge the employee and Kalama stipulated to the employee's medical status and his economic loss should it be found that the employee's injury is compensable. At trial the Administrative Law Judge found compensability and, further, accepted Kalama's application for Second Injury Fund relief relative to its continuing compensation obligations, in accord with Section 8(f) of the LHWCA, 33 U.S.C. § 908(f), as incorporated into the DBA. Isolated as the sole issue for review, therefore, is the coverage of the employee's injury via the applicability of the "zone of special danger" doctrine.

Conflicting accounts of what specifically transpired to cause the employee's left hip injury were provided by the three participants to the event, i.e., the employee and the two military policemen. While the employee stated that he injured his hip when he was caused to fall to the ground by MP Burum's kicking or "sweeping out" of his leg and MPs Burum and Sanchez testified that the employee was

injured when he charged at the two of them and slipped, falling to the ground, the facts pertinent to the "zone of special danger" analysis are undisputed.

The employee was injured in the early morning hours of July 25, 1999 at the AMVETS social hall on the Johnston Atoll while off duty and after a night of drinking and socializing. The critical events leading to the employee's fall to the ground and left hip injury include the employee's approaching two military policemen, also off duty and socializing, for purposes of challenging them to a game of pool for money, i.e., $10 a ball or $10 a game. After the MP's rebuffed the gamble the employee returned to them in approximately fifteen minutes with another betting challenge, this time a test of physical prowess and altercation. For this challenge the employee bet the MP's $100. The employee admitted at trial that he was well aware that both gambling and involvement in physical challenges were prohibited by the military base commander and that a violation of these prohibitions would result in a debarment order which would permanently remove him from the Johnston Atoll. Nevertheless, the employee did gamble and engage himself in the physical challenge, which resulted in his hip injury.

Colonel Thomas, the Installation Commander and Senior Military Officer on the Johnston Atoll, in accord with his command duties, did several days after the event issue a Debarment Order permanently removing the employee from the Atoll and forever preventing his return. That the employee was well aware that his actions with the MPs were strictly prohibited and that his violations of these prohibitions could result in his debarment from the Johnston Atoll and, consequently, his loss of employment with Kalama, was acknowledged by the employee at the trial when he admitted

lying to the police officer contemporaneously investigating the cause of his injury at the AMVETS. The employee testified that he lied to Patrolman Smith, stating that he had fallen while walking back to his table after a game of pool, because he knew that involvement in a physical altercation would result in his removal from the atoll.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT THE ZONE OF SPECIAL DANGER DOCTRINE DOES NOT IMPOSE ABSOLUTE LIABILITY UPON THE EMPLOYER

The Defense Base Act, 42 U.S.C. §§ 1651, *et seq.* (DBA), extends the provisions of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901, *et seq.* (LHWCA), to, among a specified category of cases, injury or death of an employee engaged in employment under a "public work" or service contract with the United States Government or any branch, department or agency thereof. 42 U.S.C. § 1651(a). The DBA was originally enacted to cover civilians employed at overseas military bases and has been expanded to include civilians working overseas in government sponsored construction projects, service projects, or national defense activity. *University of Rochester v. Hartman*, 168 F.2d 170, 176 (2d Cir. 1980).

Similar to claims under the LHWCA, the claimant in a DBA matter bears the burden of proving that the alleged injury arose in the course of employment. *See Director, OWCP v. Greewich Collieries*, 512 U.S. 267 (1994). However, under the DBA, the course of employment standard has been expanded by the "zone of special danger" doctrine

which was first enunciated in 1951 by Justice Frankfurter in the matter of *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951).

In *O'Leary*, the Court found that the death of an employee who drowned while attempting to rescue an unknown man from a waterway while returning from an employer provided recreation center arose within a "zone of special danger" associated with his employment in the foreign locale. In so ruling, the Court reversed the finding by the Circuit Court that the incident did not arise out of and in the course of employment under Section 2(2) of the LHWCA, 33 U.S.C.§ 902(2). Justice Frankfurter wrote that the Circuit Court's interpretation of the Act was "too restricted" finding that:

> The test of recovery is not a causal relationship between the nature of employment of the injured person and the accident. *Thom v. Sinclair*, [1917] A.C. 127, 141. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment created the "zone of special danger" out of which the injury arose. *Ibid. O'Leary*, 340 U.S. at 506-507.

Of importance to this matter, in creating the zone of special danger doctrine the Court did not provide a 24 hour per day 7 day per week basis for including any and all activity of an employee as within the course of employment. In that

regard, the Court in *O'Leary* established limits to the zone of special danger doctrine stating:

> This is not to say that there are not cases "where an employee, even with the laudable purpose of helping another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *Matter of Waters v. Taylor Co.*, 218 N.Y. at 252, 112 N.E. at 728. We hold only that rescue attempts such as that before us are not necessarily excluded from the coverage of the Act as the kind of conduct that employees engage in *as frolics of their own*. *O'Leary*, 340 U.S. at 507 (Emphasis supplied).

The dissent in *O'Leary* also recognized that the Court intended for the "zone of special danger" doctrine to have limits. Along these lines, the dissent agreed that Justice Frankfurter's majority opinion "would seem to indicate that we are leaving some place for voluntary acts of the employees outside the course of their employment for which the employer may not be liable." *O'Leary*, 340 U.S. at 510 (Justice Minton dissenting).

The Court next addressed the "zone of special danger" doctrine some 14 years later in a per curium decision in the matter of *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 330 U.S. 359 (1965). In *O'Keefe*, the Court found that the death of an employee who drowned during an off site recreational boating trip arose in the zone of special danger associated with working in South Korea on a 365 day basis

subject to the employer's call at any time. As the District Court noted "it was reasonable to conclude that recreational activities contributed to a higher efficiency of the employer's work and that when conducted in the restricted area of employment, on a work day, so to speak, and in a manner *not prohibited* by the employer, such activity was an incident of employment." *O'Keefe*, 380 U.S. at 364 (quoting, District Court slip opinion, 222 F. Supp. 4, 19) (Emphasis supplied).

However, the dissent made clear that the "zone of special danger" doctrine did not impose absolute liability upon the employer. The statutory intent could only be followed where compensation was provided for "all job-connected injuries on the actual job site and, additionally, those injuries off the job site which result from the 'special' dangers of the employment." *O'Keefe*, 380 U.S. at 370 (Justice Harlan dissenting).

In matters involving the "zone of special danger" doctrine during the nearly 55 years since *O'Leary* and 40 years since *O'Keefe* there has yet to be a Circuit Court opinion which has recognized the limits of the doctrine. To the contrary, as this matter exemplifies, courts have readily imposed absolute liability upon the Defense Base Act employer.

In this case the employee was injured off duty while drinking and socializing at a local bar. The left hip injury he suffered was as a direct consequence of his engaging in conduct expressly prohibited by the United States military command, i.e., gambling and involvement in a physical altercation. The employee's actions were frolicsome in nature, of the kind referenced by Justice Frankfurter when the limitations of the "zone of special danger" were announced.

II. CERTIORARI SHOULD BE GRANTED IN ORDER FOR THIS COURT TO IDENTIFY THE PARAMETERS OF THE ZONE OF SPECIAL DANGER DOCTRINE IN THE CIRCUMSTANCE WHEREIN THE U.S. MILITARY COMMANDER SETS THE RULES OF CONDUCT AND ACTION FOR CIVILIAN CONTRACTORS AND THEIR EMPLOYEES.

The Ninth Circuit wholly failed to consider the impact on the employer's Defense Base Act liability under the circumstances presented by this case wherein the cause of the employee's injury directly resulted from his violation of the prohibitions on conduct which the U.S. military base commander had imposed under standing order. In order to effectuate the military purposes of his command of the Johnston Atoll and to enable private governmental contractors to accomplish their support obligations the commander had made gambling and the involvement in physical altercation expressly stated prohibited activities, the violation of which would result in the issuance of a debarment order permanently removing the offending employee from the atoll, as well as from his employment with the contractor. These rules of conduct were critical to all operations on the Johnston Atoll and formed the parameters for work and social activity by its residents. The employee in this case admitted his knowledge of these rules, as well as his knowing and voluntary violation of them.

This court in its *O'Keefe* discussion, 380 U.S. at 364, has acknowledged that it is of relevance in determining the parameters of an employer's Defense Base Act liability under the "zone of special danger" doctrine whether the conduct

and activity occurring at the time of injury is prohibited or not. Nevertheless, the Ninth Circuit excluded this critical factor from its consideration.

That court's disregard and its circumvention of the "zone of special danger" doctrine is of compelling concern. As noted, the increasing privatization of United States military, security, defense and public works functions in combat and harm's way overseas locations has demanded the increasing control of civilian governmental contractors by military command orders. These orders directly manage the contactor's employees actions and conduct and are relevant to a determination of and employer's Defense Base Act liability. This Court's direction is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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